CHAI PHIN CHONG & ANOR *a*

v.

ZAINAL ABIDIN MOHD SALLEH & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING *b*
IAN HC CHIN J
[CIVIL APPEAL NO: 11-03-97-III(I)
23 JANUARY 1998

CIVIL PROCEDURE: *Documents - Agreed bundle - Whether magistrate wrong in disregarding police report - Whether magistrate misdirected - Whether evidence of defendant should be tested* *c*

TORT: *Negligence - Road accident - Duty of care - Duty to keep lookout - Anticipation - Stoppage of vehicle - Speed*

The plaintiffs' claim was dismissed by the magistrate, who had found that the encroachment of the defendants' truck was not a negligent act. He further found that the accident was attributed to the 1st plaintiff driving his motorcar at a high speed when the road condition was not good, and by a motor-cyclist for not having any lights on. The plaintiffs appealed and raised the following issues: (i) whether the magistrate was correct in disregarding the police report of the motor-cyclist, which was part of the agreed bundle of documents; and (ii) whether there was a misdirection of evidence. *d* *e*

Held:

[1] Where a document is agreed to be included in an agreed bundle without any reservation, the maker need not be called. The contents in the document are never to be regarded as admitted unless otherwise indicated and the truth can be challenged at the trial. The document does not automatically become evidence unless referred to at the trial and the truth of the contents is for the court to determine. *f* *g*

[1a] In this case, reference was made to the police report of the motor-cyclist at the trial, but the magistrate made no reference to it, nor did he test the 2nd defendant's denial of the collision of his truck with the motor-cycle. Thus the magistrate had misdirected himself on the evidence. *h*

[2] The driver of a motor vehicle has a strong duty to keep a good lookout while driving and the sharpness of the lookout required depends upon the circumstances existing at that time. A driver should always anticipate the possible presence of others on the road and should always be able to stop within the range of his permitted vision. *i*

[2a] The 2nd defendant should have driven at a speed where he could stop when the motor-cyclist came within his range of vision. His failure to stop the truck in time was the cause of his swerving into the path of the plaintiffs.

[Appeal allowed with costs.]

Cases referred to:
Daly v. Liverpool Corp [1939] All ER 142 ***(refd)***
Ho Kiong Chan v. Patipet [1966] 1 MLJ 159 ***(refd)***
Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 ***(foll)***
Wong Choon Mei & Anor v. Dr Kuldeep Singh & Anor [1985] 1 CLJ 435 ***(cit)***

Legislation referred to:
Road Transport Act 1987, s. 43(1)

For the plaintiffs - John Shek; M/s John Shek & Co
For the respondents - Roland Thomas; M/s Battenberg & Talma

Reported by Michele Saw

JUDGMENT

Ian HC Chin:

Introduction

This is an appeal against the decision of the learned magistrate handed down on 4 March 1997 by which, after a trial, he dismissed the claim of Chai Phin Chong and Then Hon Fui ('the plaintiffs') for damages for negligence against Zainal Abidin Mohd. Salleh and Pengulu AK Usiek.

Facts Of Case

The facts on the whole are undisputed and they are these. Then Hon Fui, one of the plaintiffs, was on the night of 24 September 1993 driving a motorcar at approximately 70 kph along a straight stretch of the Kuching/Serian Road when Pengulu AK Usiek was driving a truck on the same road but in the opposite direction and at approximately 30-40 kph. Pengulu AK Usiek said that the visibility at that time was not good, that it was raining, that he was using his low beam and that he saw the motorcar before the collision. The truck crossed the middle of the road, about a foot into the other side, and knocked the motorcar causing it to overturn. What made the truck go into the path of the motorcar was the presence of a man pushing an unlit motorcycle on the side of the road where the truck which was being pushed in the same direction as the truck was proceeding. Pengulu AK Usiek only saw the man, pushing motorcyle, when he was ten feet away which made him

swerve the truck which, as mentioned earlier, knocked the motorcar and caused it to overturn. The road, the learned magistrate found, was wet and slippery. It was upon those evidence which I have summarised that the learned magistrate concluded that the encroachment onto the path of the oncoming motorcar was not the result of the negligence of Pengulu AK Usiek but "an act of a responsible and rational being who not only spared one but two lives". The learned magistrate further concluded that "the accident is attributed" by Then Hon Fui when he drove at a needlessly high speed when road condition was not good and also by the motorcyclist for not having any light on. The learned magistrate concluded that the plaintiffs had failed to prove their claim and in arriving at that conclusion, the learned magistrate (1) regarded the conviction and fine of RM300 of Pengulu AK Usiek under s. 43(1) of the Road Transport Act 1987 for careless driving as being inconclusive, (2) disregarded a police report lodged by the man who was pushing the motorcycle and (3) disregarded the evidence of former Sergeant Bihos Rihong ('the police officer') who took a sketch plan of the scene of accident.

Misdirection Of Evidence

Plea Of Guilty

The learned magistrate brushed aside the defendant's plea of guilty to a charge for driving without due care and attention by saying that it is not conclusive. He did not say whether the defendant had explained why he pleaded guilty if he was not guilty of what in effect is a charge of negligent driving.

Sketch Plan Of Scene

The evidence of the police officer who drew a sketch plan of the scene of accident was also disregarded on the ground that the police officer could not remember the road was wet at that time. But the police officer was giving evidence of the road condition that he saw at least one hour after the accident. The accident happened at around 8.40pm, the police reports were made at 9.45pm and 11.10pm. Which means that the visit to the scene by the police officer was more than two hours after the accident. That could very well explain why he said the road was not wet contrary to what the plaintiff said. As for the sketch plan, it shows the various positions of the motorcycle, the motorcar and the truck and from it, at the very least, be concluded that the truck went from one side of the road to the other.

The Police Report

The man who was pushing the motorcycle made his police report at 9.45pm that night. In it he described how his motorcycle which he was pushing by the side of the road was knocked by the truck and how the truck thereafter knocked the motorcar. He was not called to give evidence. This police report was by agreement of counsel for the defendants included in a bundle marked as "agreed bundle of documents". This police report was received by a police officer who was called and who referred to the police report as being the one made by the man who was pushing the motorcycle. It is the law that (1) where a document is agreed to be included in an agreed bundle without any reservation the maker need not be called, (2) the contents are never to be regarded as admitted unless otherwise indicated and the truth can be challenged at the trial, (3) the document does not automatically become evidence unless referred to at the trial and (4) the truth of the contents is for the court to determine (*Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor.* [1997] 4 CLJ 509 FC, 521, per Peh Swee Chin FCJ). The police officer at the trial referred to the police report. However, the learned magistrate did not refer to it at all and he did not test the evidence of Pengulu AK Usiek denying the collision with the motorcycle with the statement to the contrary in the police report.

It is clear from what I have just stated that the learned magistrate had clearly misdirected himself on the evidence. He had also misdirected himself as to the duties imposed on a driver of a vehicle.

Duties On Driver

The learned magistrate failed to appreciate that the standard of care and skill required of a driver of a motor vehicle is very high (*Daly v. Liverpool Corporation* [1939] All ER 142) and that there is "a strong duty on the part of a driver to keep a good lookout while driving ... The sharpness of the lookout required depends upon the circumstances existing at the time... A driver should always anticipate the possible presence of others on the road and should always be able to stop within the range of his permitted vision ..." (*Ho Kiong Chan v. Patipet* [1966] 1 MLJ 159). Therefore, even assuming that the learned magistrate was entitled to conclude that Pengulu AK Usiek did not collide with motorcycle, he was clearly wrong in exonerating his failure to see the motorcycle until he was only 10 feet away on account of poor visibility. He should have driven at a speed where he could stop within his range of vision. It is because he failed to do that that he could not stop the truck in time and instead swerved into the path of the plaintiff, knocking and causing the vehicle of the plaintiff to overturn. That was the cause. The speed of the plaintiff had nothing to do with the accident nor contribute to it. The

truck knocked the motorcar causing it to overturn and that happened because Pengulu Ak Usiek failed to drive at a speed which allows him to see the man pushing the motorcycle and at a speed that allows him to stop the truck so as to obviate the necessity of swerving into the path of an oncoming vehicle.

Conclusions

I therefore allow the appeal and set aside the judgment of the learned magistrate. Judgment is therefore entered for the plaintiff.

Unfortunately, the learned magistrate did not do the sensible thing of assessing the damages just in case he was wrong on his finding that the defendants were not liable (see *Wong Choon Mei & Anor. v. Dr Kuldeep Singh & Anor.* [1985] 1 CLJ 435; [1985] 2 MLJ 373). This resulted in this case having to go back to the same learned magistrate for his decision on the quantum of damages. Accordingly, I order that the learned magistrate shall decide on the quantum of damages and enter a judgment for the plaintiff for the sum so found. There will be costs both here and below.